



October 14, 2009

The Honorable Bernie Buescher  
Colorado Secretary of State  
1700 Broadway, Suite 250  
Denver, Colorado 80290

Dear Secretary Buescher,

Please accept the following as the Jefferson County Clerk and Recorder's written comments regarding Proposed Secretary of State (SOS) Election Rule 45, posted on your website on Tuesday, September 29, 2009. Jefferson County appreciates the opportunity to submit comments and testimony regarding the proposed rules and is hopeful that the comments will be carefully considered by your office and be reflected in the final promulgated rules.

Generally, we feel that there are improvements in this draft over the existing rule and this is a step in the right direction. We are especially encouraged by the volume of unnecessary language that is being removed from this rule in an effort to simplify and clarify the certification process. We look forward to working in partnership with your office to improve this process.

Our first comment is not necessarily about what is included in the draft rule; rather, it regards what has been omitted. Section 1-5-623(2) Title 1 of the Colorado Revised Statutes provides a "grandfather clause" for the continued state certification of any existing electronic voting equipment that was used in the conduct of the 2008 General Election. We feel it is important that this clause be reflected in the SOS Election Rule concerning voting systems certification. A possible suggestion is an inclusive list of voting systems that were used in the 2008 General Election, and are explicitly exempted from any new certification requirements that will be promulgated as part of this rulemaking process.

Please also consider the legislative intent of HB08-1335 in the promulgation of these rules. It is important to have a mechanism to include county election personnel in the functional testing process. The legislative intent was clearly to involve county staff who is most familiar with operating the equipment in the testing process. We ask that such a provision be included in these rules so the end-users can work in partnership with the testing team to further improve the testing and certification process.

**Pam Anderson**  
CLERK AND RECORDER

**Lori Webb**  
CHIEF DEPUTY

**Joshua B. Liss**  
DEPUTY OF ELECTIONS

**Teri Schmaedecke**  
CLERK TO THE BOARD

**Joan K. Card**  
DIRECTOR OF RECORDING

**Sharon Carnefix**  
DIRECTOR OF MOTOR  
VEHICLE

### **Additional Comments to Specific Proposed Rules:**

**45.3.2:** *“...as well as any additional testing that is deemed necessary by the Secretary of State.”*

It is our opinion that such language could lead to regulatory over-reaching. In the past, a wide range of “experiments” were conducted that did not account for practical application of the system. As expected, conducting tests clearly outside the intended use of the equipment produced abnormal results. We ask that the testing of the equipment not include anything outside of what is outlined in the promulgated rules and that this language is stricken from the draft.

**45.3.3:** The draft of this rule removes all of the timelines that the Office of the Secretary of State must follow during the certification process. Again, in learning from past experience, we feel it is important that firm timelines for the certification process are established to prevent uncertainty prior to an election. State voting system certification is only one of the first steps in a long process of contract negotiation, procurement, training and implementation of a voting system. The certification process should be managed like a project with specific deadlines and milestones, including penalties or some form of relief if these timelines or milestones are not met. If a vendor does not meet the timelines set for them, they risk losing certification. If the certification team does not meet their timelines, the consequences to the counties and the voters may be more severe. We also suggest that unless delays in the certification process are caused by the actions or non-actions of a voting system provider, if the certification team is unable to meet the timelines, a voting system be given conditional temporary certification until testing can be completed.

**45.5.1.3.2:** *“...appropriate engineering standards...”*

More specific language and clear definition is needed. What are “appropriate” engineering standards, and who determines what is, and is not, appropriate?

**45.5.2.2.4:** Are these time limits necessary? Where did they come from? Are they vital in determining whether or not to certify a system? If not, perhaps they should be stricken.

**45.5.2.3.13(d):** *“Any available data on problems caused for persons who experience epileptic seizures due to the DRE voting device’s screen refresh rate.”*

Does any such data actually exist? How is this a necessary component of certification? This language should probably be stricken.

**45.5.2.3.14(b):** This appears to be duplicative of the 2002 Voluntary Voting System Guidelines (VVSG). It should be removed similar to what was done with Rule 45.5.2.6.1(f).

**45.5.2.4.3(a – c):** This entire section seems to add an additional pre-certification step to the process that brings up many questions and perhaps unnecessarily complicates an already-complicated process. These tests have a similar feel to the “Red Team” testing done in California. Are they necessary, and for what purpose? If not, they should be removed. If they are necessary, then perhaps they should be included as part of the functional testing process, not as an additional step prior to certification.

**45.5.2.4.3(d):** *“The Secretary of State may use contractors appropriate expertise and experiences to perform the independent analysis;”*

This draft rule marks a departure from the SOS using EAC approved testing labs, and allows them to use “contractors with appropriate expertise and experience”. This brings up several questions. Why not use approved testing labs? Who are these other contractors? Who makes the determination as to what are “appropriate” levels of expertise and experience? We feel this draft language is too subjective and needs clearer definition.

**45.5.2.4.3(f):** *“When an analysis performed by another state is used, the Secretary of State has the right to reject any evaluations if not satisfied with the work product and to require additional analysis to meet the requirements of this rule.”*

Same comment as for Rule 45.3.2. Additional analysis should remain within the realm of the intended and “real-world” use of the equipment and be clearly defined by this rule.

**45.5.2.6.1(a)(i):** Typo. “...and shall not have the ability to access or HAVE knowledge of the database administrator password.”

**45.5.2.6.1(c)(i):** We are pleased to see this was amended to reduce the amount of specificity and eliminate an unrealistic standard. Positive change.

**45.5.2.6.1(d)(i):** Same comment as above. Good change.

**45.5.2.6.1(f):** Good to see that language duplicative of the 2002 VVSG is being eliminated. Positive change.

**45.5.2.8:** Many (if not all) of these requirements are already covered in Rule 35 regarding accessibility. Perhaps this section should be removed at an effort to continue reducing duplication.

**45.5.2.9.22:** *“When V-VPAT components are integrated into voting systems the new configuration of the system must comply with existing state PRE-ELECTION testing and POST-ELECTION auditing requirements.”*

The above changes are suggested in order to clarify that it is the pre- and post-election activities that are being referred to, and not the certification testing. If the intent of this rule is to refer to certification testing, we suggest that it be stricken. Otherwise under this rule, the retro-fit of a system to include V-VPAT would invalidate the “grandfathering” of that system and make it subject to new certification standards.

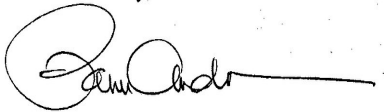
**45.6.2.1.5:** We think it is good that the voting system provider will be allowed to have a representative present during testing. However, we believe it to be counterproductive to prohibit the vendor from touching the equipment during testing. In fact, there may be instances where it would be advantageous to have the vendor operating the equipment during testing at the request of, and under the direct supervision of the testing board. Voting system providers are more familiar with the equipment they provide than are members of the testing board. Having them operate it (while on camera and alongside testing board members) can only streamline the process and resolve issues in a more timely manner. This rule may also be a good place to add a provision allowing County Clerk staff to be present during testing, as referenced above.

**45.6.2.3.9:** We are unsure of the purpose or usefulness of this rule. Mark-sense or optical scan devices are designed to read marks made by the voter using specific color ink. Voter education and outreach efforts are aimed at educating our voters in how to properly mark a ballot and

instructions are printed on the ballot face itself. Testing should be limited to what the system is designed to do, not trying to see what colors it can and cannot detect. While this may provide for an interesting experiment, it has no purpose in certification testing. Again, testing should account for the “real world” use of the equipment. Ballots marked with an ink that is unreadable to the machine will either be identified by the election workers prior to scanning, or automatically identified as unreadable or blank by the scanner, and sent to a resolution board for duplication.

Again, we appreciate the efforts of your office to amend this rule, and are grateful to have the opportunity to partner with you in improving the state certification process. The draft rules represent some significant improvement, and we are hopeful that our comments will do the same. Our office would be happy to discuss these suggestions with you or your staff should questions arise.

Sincerely,

A handwritten signature in black ink, appearing to read "Pam Anderson", with a long horizontal flourish extending to the right.

Pam Anderson  
Clerk and Recorder  
Jefferson County